



July 14, 2008

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Portals II, Room TW-A325
Washington, DC 20554

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EX PARTE NOTICE

Re: Implementation of Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996—Petition for Rulemaking or, in the Alternative, Petition to Address Referral, CC Docket No. 96-128

Dear Ms Dortch:

On July 11, 2008 I met with Greg Orlando, Legal Advisor to Commissioner Deborah Taylor Tate. We discussed the above-referenced proceeding, specifically the proposal by petitioners Martha Wright, et al. (Petitioners) to cap rates for interstate calls made from correctional facilities. Embarq is provider of inmate telecommunications services and, as such, both Embarq and its customers have a direct interest in the outcome of this proceeding.

Petitioners are asking the Commission to resolve a state political question. Embarq reiterated the substance of the comments it filed in this docket on May 2, 2007 addressing the Petitioners' Alternative Rulemaking Proposal. Specifically, it is clear that Petitioners are asking the Commission to intervene in and ultimately resolve a state political question, namely, at what rate should state correctional facilities permit inmates to make telephone calls. Even a cursory review of Petitioners' Alternative Rulemaking Proposal (Proposal) reveals that the heart of their complaint is with the fees inmate service providers must pay to prison facility operators in order to win contracts to provide inmate calling services. The Commission has recognized that these fees are a primary cause of high inmate calling rates, and that the solution lies with the states rather than Commission rate regulation.¹

Nobody, including Petitioners, argues that inmate service providers, such as Embarq, are receiving unjust or unreasonable profits from inmate calling. It is apparent, therefore, that the Proposal does not address a Communications Act problem; rather the Commission is being presented with a state political question that should be resolved, and routinely is resolved, through state political processes. In fact, the facts in Petitioners' own Proposal provides several examples of such resolution.²

¹ *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Remand, 17 FCC Rcd 3248, 3261 ¶ 29 (2002).

² Petitioners' Alternative Rulemaking Proposal, at 3.

The Commission cannot readily use the location rent analysis described in the NPRM to exclude site commissions from the costs of providing inmate telecommunications. Second, Embarq explained that the analysis in the NPRM in this docket does not support a finding that the payments service providers such as Embarq must make to correctional facilities are not legitimate costs of service. In the NPRM, the Commission wrote that it had determined in the private payphone context that:

“a payphone that earns just enough revenue to warrant its placement, but not enough to pay anything to the premises owner” is “a viable payphone . . . because the payphone provides increased value to the premises.” Therefore, location rents are not a cost of payphones, but should be treated as profit.³

Unlike in the regular payphone context, however, a correctional facility does not choose to install payphones to add value and attract customers—they are not even for-profit institutions. In addition, a jail or prison incurs additional costs (beyond those incurred by the telecommunications service provider) when making it possible for inmates to place calls. Therefore, the analysis of site commissions in the Commission’s prior orders is not applicable, and the Commission needs to consider including site commission to prisons as part of the cost of inmate telecommunications services.

There is an additional, and compelling, public policy reason for the Commission to tread carefully in the areas of inmate calling rate caps. Unlike in the private payphone context, society (and, indeed, Petitioners) may not want prisons to shut off inmate calling rights. Therefore, the Commission must account for the fact that some prison facilities may respond to a loss of compensation by simply blocking interstate calls. One clear example is Texas which, until recently, did not allow inmates to make calls. The Legislature passed, and the Governor signed, legislation reversing this policy. That law requires Texas, however, to collect 40% commissions. Presumably, it will have to shut off interstate calling if a Commission-imposed cap prevents this result.

The Commission should carefully consider cost data in order to avoid the possibility of requiring rates that are not sustainable under judicial review. As counsel to Securus Technologies explained in the letter filed in the docket on July 8, 2008, the industry is working on cost data that it is anticipated will be filed in the docket by mid-August. Embarq expects that key points will include:

- Inmate calling involves substantial additional costs compared with regular payphones.
- Very little of the cost of service is incurred on a per-minute basis, which argues against a per-minute cap on rates.
- Costs vary significantly based on prison population (number of beds).
- Average call duration is typically 12 minutes.

³ *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Order on Remand & Notice of Proposed Rulemaking, 17 FCC Rcd. 3248, 3254-55 ¶ 15 (2002) (citations omitted).

- Bad debt is substantially higher than in the regular payphone context (so the spread between debit and collect calls should be greater than \$0.05).

It is worth noting that the \$0.20/\$0.25 analysis in the Martha Wright petition appears to be based on an assumption of a 20-minute average call duration.⁴ If so, the analysis will not withstand judicial scrutiny as that assumption is flatly inconsistent with the facts. Indeed, many facilities (including most of those served by Embarq) have 15 minute limits on interstate calls, so a 20-minute average is simply impossible. Instead, Embarq submits that the true average is around 12 minutes, which would lead the Commission to adopt rates substantially higher than \$0.20 per minute even using Petitioners' analysis.

Pursuant to Section 1.1206(b) of the Commission's rules, one copy of this electronic notice is being filed in the above-referenced dockets. Please call me if you have any questions

Please contact me if you have any questions or need anything else.

Sincerely,



Jeffrey S Lanning

cc: Greg Orlando

⁴ Petitioners' Alternative Rulemaking Proposal, at 19, 21.